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In the Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL N. SHERIDAN AND
MARY A. SHERIDAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the exception in the Federal Tort Claims Act barring suits against the United States for "[a]ny claim arising out of assault [or] battery" (28 U.S.C. 2680(h)) bars a claim that the government negligently failed to prevent its employee from committing a battery.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 823 F.2d 820. The opinion of the district court (Pet. App. 20a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1987. The petition for a writ of certiorari was filed on October 16, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

An enlisted Navy medical aide at Bethesda Naval Medical Center, Robert W. Carr, fired several shots from a rifle into petitioners' automobile, injuring petitioner Mary Sheridan. Petitioners brought this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, alleging that the Navy had negligently failed to pre-

vent the battery by Carr. Specifically, they alleged that Carr had kept the rifle in his quarters at the Medical Center in violation of Navy regulations and that the Navy "knew or should have known" that fact (Complaint paras. 7, 9; C.A. App. 6-7).[1] They further alleged that Carr "had displayed instances of psychological instability in the past of such nature that the [Navy] knew or should have known that he posed a threat to the wellbeing and safety of others," but that the Navy "took no steps to quell this threat" (Complaint para. 8; C.A. App. 7).

Petitioners elaborated upon the allegations in their complaint in their supplemental opposition to the government's motion to dismiss (C.A. App. 9-20), which included evidence submitted at Carr's court-martial. Relying on that evidence, the district court stated: Carr began drinking after he finished his shift on February 6, 1982. At about nine o'clock that night, three Navy corpsmen found him, inebriated, in an old hospital building. Two of them supported Carr and the third took Carr's bag, and they attempted to take him to the emergency room. On the way there, Carr broke away, grabbed his bag, and reached into it, revealing a rifle barrel. The three corpsmen fled.[2] Carr then left the building and began shooting at passing vehicles. Bullet fragments struck Mary Sheridan, who was traveling in a car with her husband, Michael Sheridan. Pet. App. 20a-21a.

[1] There is no allegation or other indication in the record that either the rifle Carr used, which was a .22 caliber rifle (Pet. App. 2a), or his ammunition belonged to the military.

[2] Petitioners' complaint contained no allegation that the three corpsmen failed to notify security officers, although petitioners now state (Pet. 4), without citation, that the corpsmen did not "attempt to alert base security," but instead "simply fled, apparently without another thought." In fact, Carr's court-martial record shows that the corpsmen promptly notified a security officer. One of the three corpsmen, Nurse Florence Jackson, testified at the court martial that she immediately notified Timothy Uram, who was on security watch, of the danger. Uram testified that he promptly responded to the warning.

The district court granted the government's motion to dismiss (Pet. App. 20a-29a). It held that petitioners' action is barred by the intentional tort exception (28 U.S.C. 2680(h)), which provides in part that the government is not liable for "[a]ny claim arising out of assault [or] battery." The district court noted that Section 2680(h) bars respondeat superior liability of the government for a battery by its employee but does not bar claims that the government negligently supervised a person who is not a government employee. The courts are divided, the district court found, on whether Section 2680(h) bars claims that the government's negligence resulted in a battery by its *employee*. Pet. App. 22a-26a. It held that the controlling precedent in the Fourth Circuit (*Hughes* v. *United States*, 662 F.2d 219 (1981)) bars such negligent supervision claims (Pet. App. 26a-27a).[3]

A divided court of appeals affirmed (Pet. App. 1a-19a). The court held that *Hughes* and *Thigpen* v. *United States*, 800 F.2d 393 (4th Cir. 1986), controlled. It found no merit to petitioners' attempt to distinguish those cases on the ground that Carr violated regulations by keeping the rifle in his quarters (Pet. App. 3a-4a). The court also rejected petitioners' argument that Section 2680(h) should not bar this action because the shooting had not been connected with Carr's job responsibilities. It held that Section 2680(h) bars all "actions alleging negligence of the supervising employees when the underlying tort is an assault or battery by a government employee" (Pet. App. 5a).

[3] The district court also rejected petitioners' argument that there had been no battery because Carr's drunkenness prevented him from having the requisite intent. The district court held that under Maryland law the intent required is only a "general intent to do an act and not a specific intent to cause harm" and that "the gist of the action is not hostile intent on the part of the [tortfeasor], but, the absence of consent to the contact on the [injured party's] part" (Pet. App. 28a (citations omitted)). Petitioners did not challenge this state-law holding in the court of appeals and they do not challenge it here.

Chief Judge Winter dissented (Pet. App. 6a-19a). In his view, "the government should be held subject to suit in all cases where its alleged liability is independent of the assailant's employment status—i.e., where a court can isolate a government duty and source of negligence that is based on something other than the fortuitous circumstance that the government happens to be the assailant's employer" (*id.* at 6a). Judge Winter also stated that Section 2680(h) should not be held to bar claims where the government's violation of a regulation constitutes negligence per se (Pet. App. 13a-18a).

ARGUMENT

The courts below correctly held that this action is barred by Section 2680(h) because petitioners' claim plainly arises out of the battery by Carr. This Court should grant certiorari, however, because the petition presents an important issue that was considered but not resolved in *United States* v. *Shearer*, 473 U.S. 52 (1985), and the conflict among the courts of appeals continues on this frequently-litigated issue. Moreover, the minority view advocated by petitioners would vastly increase the government's exposure to tort liability for the off-duty actions of its several million military and civilian employees.

1. In *Shearer*, the Court unanimously held (473 U.S. at 57) that *Feres* v. *United States*, 340 U.S. 135 (1950), barred the claim that the Army had negligently failed to control an off-duty serviceman, known to be dangerous, who kidnapped and murdered a fellow serviceman. The Court did not decide whether the intentional tort exception also barred the claim.[4] However, four of the eight

[4] The first question presented in the government's petition for a writ of certiorari in *Shearer* was whether the claim was barred by Section 2680(h).

Justices participating in the case concluded that Shearer's claim was barred by the intentional tort exception as well as by the rule of *Feres* (473 U.S. at 56).[5]

Chief Justice Burger's opinion for the plurality in *Shearer* correctly concluded that a claim arising out of a battery by a government employee is barred by Section 2680(h). As stated in that opinion, "Section 2680(h) does not merely bar actions *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery" (473 U.S. at 55 (emphasis in original)). Here, as in *Shearer*, "[n]o semantical recasting of events can alter the fact that the battery was the immediate cause of [petitioners' injuries] and, consequently, the basis of [their] claim" (*ibid.*). While finding the legislative history "sparse" (*ibid.*), the plurality concluded that it was consistent with the view that all claims arising out of "deliberate attacks by Government employees" would be barred, not simply respondeat superior claims. The plurality also drew support from the 1974 amendment waiving sovereign immunity for claims arising out of the intentional torts of law enforcement officers, noting that "[t]he premise of the legislation was that unamended § 2680(h) 'protect[ed] the Federal Government from liability when its agents commit[ted] intentional torts such as assault and battery.' " *Id.* at 56 (quoting S. Rep. 93-588, 93d Cong., 1st Sess. 3 (1973)). Further, the plurality relied upon this Court's interpretation of the parallel exceptions in Section 2680 in *United States* v. *Neustadt*, 366 U.S. 696 (1961) (construing "misrepresentation" in 28 U.S.C. 2680(h)), and *Kosak* v. *United States*, 465 U.S. 848 (1984) (construing 28 U.S.C. 2680(c)), where the Court construed "arising out of"

[5] Justices White, Rehnquist, and O'Connor joined the portion of Chief Justice Burger's opinion concluding that Section 2680(h) barred Shearer's claim. Justices Brennan, Marshall, Blackmun, and Stevens did not join that portion of Chief Justice Burger's opinion, but did not separately address the issue (473 U.S. at 59-60). Justice Powell did not participate.

broadly (473 U.S. at 56).[6] All of those factors apply with equal force in this case and show that Section 2680(h) bars petitioners' claim that the government can be held liable for the injuries caused by Carr's battery.[7]

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[6] Petitioners mistakenly argue (Pet. 11-12, 13, 14-15) that *Block* v. *Neal*, 460 U.S. 289 (1983), supports their position. To the contrary, that case demonstrates that petitioners' claims are barred. The Court there, in distinguishing *Neustadt*, held that the plaintiff alleged two different claims, one of which did not arise out of a misrepresentation because "the Government's misstatements are not essential to plaintiff's negligence claim," so that that claim was not barred by the intentional tort exception (460 U.S. at 297). The battery to petitioners, however, is "essential" to their claim: but for the battery, the Navy's alleged negligent supervision of Carr would have caused them no injury. Thus, as the Court made clear in *Block* v. *Neal, supra*, their claim is barred by the intentional tort exception.

[7] Petitioners argue (Pet. 11-13) that this case is distinguishable from *Shearer* because (1) the government's violation of regulations constitutes negligence per se, and (2) the government's duty to protect petitioners is independent of its duty to supervise its employee Carr. There is no basis for petitioners' distinctions. As to the first point, the court below (Pet. App. 3a-4a) correctly held that the alleged violation of the Navy regulation prohibiting possession of firearms on base and requiring violations of this prohibition to be reported adds nothing to petitioners' case. Accord *Satterfield* v. *United States*, 788 F.2d 395, 398 (6th Cir. 1986). Petitioners, like Shearer, are attempting to "avoid the reach of § 2680(h) by framing [their] complaint in terms of negligent failure to prevent the assault and battery" (*United States* v. *Shearer*, 473 U.S. at 55 (plurality opinion)).

As to petitioners' second purported distinction of *Shearer*, the Navy owed no duty to petitioners that is independent of its duty to supervise its employee Carr. Petitioners contend (Pet. 12-13) that the government would have been liable if their assailant had not been a government employee, relying upon cases such as *United States* v. *Muniz*, 374 U.S. 150 (1963), and *Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954), which have held that Section 2680(h) does not prevent the government from being held liable for negligently failing to prevent intentional torts by inmates of prisons or mental hospitals. But, as the *Shearer* plurality explained, "[i]n enacting the Federal Tort Claims Act, Congress' focus was on the extent of the Government's liability

This Court's recent decision in *United States* v. *James*, No. 85-434 (July 2, 1986), also supports the result reached by the courts below. *James* involved 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *." The court of appeals held that Section 702c did not bar claims by recreational users of reservoirs who were injured when the government negligently failed to warn them before opening gates to release flood waters. This Court reversed, holding that the plain language of the statute barred all liability for damages from flood waters. Under *James*, statutory preclusions of liability for specified injuries—damages from flood waters in *James* and injuries from intentional torts here—cannot be evaded by alleging that the injuries also resulted from the negligence of government employees. Indeed, from the government's perspective this case is stronger than *James* because Section 702c uses the phrase "*for* any damage from" instead of the broader phrase "arising out of" used in Section 2680(h).

2. Since *Shearer*, six courts of appeals have followed the plurality's construction of Section 2680(h). *Thigpen* v. *United States*, 800 F.2d 393 (4th Cir. 1986) (barring claims of minor dependents of retired military personnel who were sexually assaulted by a medical corpsman while they were patients in a military hospital); *Miele* v. *United States*, 800 F.2d 50 (2d Cir. 1986) (barring claim arising when an AWOL serviceman threw acid into the face of a four-year-old boy); *Hoot* v. *United States*, 790 F.2d 836

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for the actions of its *employees*" (473 U.S. at 56-57 (emphasis in original)). Thus, although intentional torts by non-employees have been held beyond the scope of Section 2680(h), the *Muniz* and *Panella* line of cases provides no support for the exception petitioners would create.

(10th Cir. 1986) (barring claim arising out of physical assault upon a civilian woman by a soldier); *Metz* v. *United States*, 788 F.2d 1528 (11th Cir. 1986), cert. denied, No. 86-189 (Nov. 3, 1986) (barring claims of intentional infliction of emotional distress and invasion of privacy, even though these torts are not expressly specified in Section 2680(h)); *Johnson* v. *United States*, 788 F.2d 845 (2d Cir. 1986), cert. denied, No. 86-114 (Oct. 20, 1986) (barring claim arising out of a mailman's sexual assault upon a young girl); *Satterfield* v. *United States*, 788 F.2d 395 (6th Cir. 1986) (holding alternatively that Section 2680(h) barred the claim that negligent supervision and violation of regulations led to the off-post and off-duty murder of one soldier by other soldiers); *Garcia* v. *United States*, 776 F.2d 116 (5th Cir. 1985) (barring claim arising from a sexual assault by an Army recruiter upon a potential recruit).[8]

These decisions conflict with two decisions of the Third Circuit issued prior to this Court's decision in *Shearer*. *Shearer* v. *United States*, 723 F.2d 1102 (1983), rev'd on other grounds, 473 U.S. 52 (1985); *Gibson* v. *United States*, 457 F.2d 1391 (1972) (holding that Section 2680(h) did not bar claim by an on-duty Job Corps instructor who was stabbed by a Job Corps trainee, a government employee for FTCA purposes under 29 U.S.C. 1706(a)(3)).

[8] Even before *Shearer*, the majority of the courts of appeals had held that Section 2680(h) barred claims alleging that the government's negligent supervision of its employees had failed to prevent them from committing intentional torts. See, *e.g.*, *Naisbitt* v. *United States*, 611 F.2d 1350 (10th Cir.), cert. denied, 449 U.S. 885 (1980) (barring claims arising out of multiple murders, rapes, and other batteries by off-duty, off-post servicemen); *Wine* v. *United States*, 705 F.2d 366 (10th Cir. 1983) (barring claims arising out of kidnapping, sexual assault, and shooting by an off-duty serviceman); *Hughes* v. *United States*, 662 F.2d 219 (4th Cir. 1981) (barring claim arising out of indecent sexual liberties with minors by an on-duty postman).

The Third Circuit has not reconsidered the issue since this Court's decision in *Shearer*. Three panels of the Ninth Circuit have rejected the analysis of the *Shearer* plurality, however; the government's petitions for rehearing en banc are pending in those three cases. *Morrill* v. *United States*, 821 F.2d 1426 (1987) (holding that Section 2680(h) does not bar the claim by a civilian go-go dancer that she was raped in a servicemen's club by an off-duty sailor as a result of the Navy's negligent failure to provide her a safe place to work); *Kearney* v. *United States*, 815 F.2d 535 (1987) (holding that Section 2680(h) does not bar claim on behalf of a civilian woman who was murdered on a military base by an off-duty soldier where the plaintiff alleged that the Army negligently allowed the murderer to violate his restriction to base); *Bennett* v. *United States*, 803 F.2d 1502 (1986) (holding that Section 2680(h) does not bar claims of students at an Indian boarding school who were sexually molested by a teacher allegedly negligently hired and supervised by the Department of the Interior).

These cases illustrate the frequency and variety of claims that have arisen concerning the proper construction of the intentional tort exception.[9] They also indicate the potentially vast exposure of the government to new tort liability if petitioners' view of Section 2680(h) were accepted. Since this case presents an important issue that is frequently litigated, and the courts of appeals are in conflict, review is warranted here to decide the question left unresolved in *Shearer*.

[9] Whether the government can be held liable when it negligently fails to prevent its employees from committing batteries is also at issue in two other pending court of appeals cases of which we are aware. *Doe* v. *Scott*, 652 F. Supp. 549 (S.D.N.Y. 1987), appeal pending, No. 87-6061 (2d Cir. argued Oct. 2, 1987) (alleging sexual molestation at military day-care center); *Doe* v. *United States*, No. 87-1436 (7th Cir. argued Oct. 1, 1987) (same).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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